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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

SHANE D. MOSLEY, SR.,

Plaintiff,

vs.

VICTOR CONTE,

Defendant.

Case No. C 08-01777 JSW

**OPPOSITION TO MOTION FOR  
EXPEDITED DISCOVERY AND TRIAL**

Hearing Date: TBD  
Time: TBD  
Courtroom: 2

HON. JEFFREY S. WHITE

1 **I. INTRODUCTION**

2 Professional boxer and public figure Shane Mosley seeks expedited discovery and trial in  
 3 his recently filed defamation action. His slander and libel claims are based on the puzzling  
 4 proposition that he did not “knowingly” inject himself with illegal performance enhancing drugs.  
 5 Mosley wants a quick trial in the hopes of obtaining a permanent injunction that would prohibit  
 6 the publication of a book detailing his drug use. Mosley contends that publication of the book  
 7 will cause “irreversible damage” to his reputation. Mosley ignores the undisputed fact that his  
 8 drug use has been the subject of massive, nationwide media attention for years. There is nothing  
 9 extraordinary about this case that requires expedited discovery or a trial within four months of  
 10 filing the complaint.

11 Mosley does not meet the legal standard for expedited discovery and trial. Such relief  
 12 may only be granted on a showing of good cause. The only “good cause” advanced by Mosley is  
 13 his erroneous belief that a quick trial will result in the Court issuing an unconstitutional prior  
 14 restraint banning a book that will detail Mosley’s already well-documented drug use. That is not  
 15 good cause. Rather, it reflects Mosley’s fundamental misunderstanding of First Amendment  
 16 law.

17 Granting expedited discovery and trial will greatly prejudice defendant. This action will  
 18 involve numerous out-of-state witnesses and complex expert testimony related to Mosley’s drug  
 19 use. Defendant is entitled to time to prepare his defense, evaluate possible counterclaims,  
 20 potentially move to transfer and consolidate this action with other defamation actions arising  
 21 from Mosley’s drug use and bring dispositive pre-trial motions. This can be prevented by the  
 22 trial schedule urged by Plaintiff.

23 Extraordinary relief should not be granted because it is based on the erroneous  
 24 assumption that a hasty trial on the merits will entitle Mosley to a permanent injunction. Even if  
 25 an injunction were issued, it could not be enforced against non-parties to this case, such as the  
 26 publishing house that plans to publish Mr. Conte’s book, or the thousands of nationwide media  
 27 outlets that have reported, and will continue to report on, Mosley’s admitted illegal drug use.  
 28 Accordingly, an expedited trial cannot result in the relief he is seeking. All told, there are no

1 exigent circumstances here that warrant extraordinary relief, let alone a trial within four months  
 2 of filing the complaint in a case where the plaintiff is seeking sizeable compensatory and  
 3 punitive damages. As such, Mosley's motion should be denied.

## 4 **II. BACKGROUND**

5 This case is still in its nascent stage. Less than one month ago, on April 2, 2008, Mosley  
 6 filed a complaint for slander and libel against Defendant Victor Conte. (*Declaration of Ivo*  
 7 *Labar* ("Labar Decl."), ¶ Exh. A, Complaint). The complaint alleges that, in July 2003, Mosley  
 8 and his trainer, Daryl Hudson, met with Conte and that Conte recommended certain health  
 9 supplements to Mosley. (*Id.* ¶ 7). Conte allegedly assured Mosley that the drugs were legal.  
 10 (*Id.* ¶). The complaint further alleges that on March 29<sup>th</sup> and 30<sup>th</sup> 2008, Conte gave a series of  
 11 interviews in which Conte falsely accused Mosley of "knowingly" taking illegal performance-  
 12 enhancing drugs. (*Id.* ¶¶ 12, 13, 24, and 34). The complaint seeks compensatory damages,  
 13 punitive damages and a permanent injunction preventing Conte from publishing a book detailing  
 14 Mosley's drug use. (*Id.* ¶ at p. 9). Mosley contends that publishing the book will cause  
 15 "irreversible damage" to Plaintiff's reputation on a national scale. (Motion at ¶ 3.)

16 The complaint is silent on whether Mosley ever ingested the drugs that Conte gave him.  
 17 This omission is curious given that it is an undisputed fact that Mosley has admitted to illegal  
 18 drug use. (*Labar Decl.* ¶, Ex. C). This fact has been public knowledge for years. (*Id.*) Indeed,  
 19 in 2003, Mosley testified before a federal grand jury investigating the BALCO's link to a number  
 20 of professional athletes. (*Id.*, Ex. D). The government's chief witness in the BALCO trial, IRS  
 21 agent Jeff Novitzky, publicly testified about Mosley's extensive illegal drug use that was done in  
 22 preparation for Mosley's championship bouts. (*Id.*, Ex. C). Reports linking Mosley to illegal  
 23 drug use have been circulated worldwide, both in print and on the Internet, since 2003. (*Id.*, Exs.  
 24 B-D). Mosley's complaint omits that Mosley was recently sued for defamation by Darryll  
 25 Hudson, his former training couch. Hudson alleges that Mosley defamed Hudson by falsely  
 26 accusing Hudson of encouraging Mosley to take illegal drugs. (*Labar Decl.* ¶, Ex. E). That  
 27 case, *Hudson v. Mosley*, Case No. 08-0118, is currently pending in the Central District of  
 28 California. Mosley has not moved for an expedited trial in that action.

1 **III. ARGUMENT**

2 **A. THERE IS NO GOOD CAUSE WARRANTING EXPEDITED DISCOVERY**

3 The Federal Rules of Civil Procedure provide, in applicable part, that “a party may not  
4 seek discovery before the parties have conferred by Rule 26(f)” except by order of the court.  
5 Fed. R. Civ. Proc. 26(f).<sup>1</sup> Mosley seeks to override this well-established procedure here.

6 The court may only expedite discovery where the moving party demonstrates good cause  
7 to do so. Semitool, Inc. v. Tokyo Electron Am., Inc., 208 F.R.D. 273, 276 (N.D. Cal. 2002).  
8 “Good cause may be found where the need for expedited discovery, in consideration of the  
9 administration of justice, outweighs the prejudice to the responding party.” Id. see also Fed. R.  
10 Civ. Proc. 26(d)(2). There is no good cause here. Courts have found good cause only in exigent  
11 circumstances where there is a likelihood that evidence may be destroyed or where a preliminary  
12 injunction is sought. Pod-Ners, LLC v. Northern Feed & Bean, 204 F.R.D. 675, 676 (D CO  
13 2002); Qwest Communications Int’l, Inc. v. Worldquest Networks, Inc., 213 F.R.D. 418, 419 (D  
14 CO 2003). This is not such a case.

15 Mosley’s sole argument for a finding of good cause is his unsupported allegation that the  
16 pending publication of Conte’s book will cause “irreversible damage” to Mosley’s reputation.  
17 Mosley’s argument leads with its chin. Mosley’s complaint *admits* that the alleged defamatory  
18 statements have already been published in national publications such as *New York Daily News*,  
19 *USA Today* and *Sports Illustrated* magazine. (*Complaint* ¶ 37). The complaint also alleges that  
20 the statements have been republished on the World Wide Web. (*Id.*). Indeed, a Google search  
21 for “Shane Mosley Drug Use” yields tens of thousand of results. (*Labar Decl.* ¶ F).  
22 Accordingly, there is no basis for the assertion that further dissemination of Conte’s statements  
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24 <sup>1</sup> As a threshold matter, Defendant objects to Plaintiff’s effort to style this motion as one  
25 brought pursuant to Local Rule 7-1, which is limited to routine administrative procedures not  
26 covered by other federal rules. Here, there is a federal rule on point, Rule 26. Plaintiff should  
27 have filed a noticed motion pursuant to Rule 26, or in the alternative, an *ex parte* request for  
28 shortened time to hear such a motion. He has done neither. Permitting plaintiff to obtain  
expedited relief under L.R. 7-11 effectively interferes with defendant’s right to oppose the  
motion in a thorough manner with adequate notice.

1 will cause “irreversible damage” to Mosley’s already battered reputation. Mosley cannot point  
 2 to a single case with similar facts that supports his request. Under Mosley’s shortsighted  
 3 argument, every plaintiff in every defamation claim would be entitled to seek an expedited trial  
 4 where a defendant evidences an intent to repeat the alleged defamation. Such a scheme is  
 5 wholly unworkable.

6 **B. EXPEDITED DISCOVERY AND TRIAL WILL GREATLY PREJUDICE DEFENDANT**

7 Any order compelling expedited discovery and trial will greatly prejudice the defendant.  
 8 This case will involve numerous out-of-state witnesses who have relevant information about  
 9 Mosley’s drug use, and substantial expert testimony regarding the banned performance-  
 10 enhancing drugs that are the subject of the alleged defamation. (*Labar Decl.* ¶ 8). This expert  
 11 testimony will be highly relevant, give Mosely’s disingenuous assertion that he did not “know”  
 12 he was injecting himself with illegal drugs when he visited the BALCO lab. (*Id.*).

13 Counsel needs time to prepare for the defense of this fact-intensive action, and a proper  
 14 defense cannot be mounted in a few months time. (*Id.*). Defendant has not yet even responded  
 15 to the complaint. Defendant needs time to consider counterclaims, potentially move to transfer  
 16 and consolidate with the Hudson action in the Central District and bring pre-trial dispositive  
 17 motions. Plaintiff’s proposed schedule for completing initial disclosures by the end of the  
 18 month in preparation for a July trial is not feasible. Indeed, the best evidence that the plan is  
 19 unworkable is that Plaintiff has not attached a proposed Rule 26 plan detailing how the discovery  
 20 in this case could be completed on an expedited basis. Mosley seeks a quick adjudication of his  
 21 claim for tactical reasons only. Allowing such procedural fencing would cause great harm to the  
 22 Conte’s ability to defend this claim fairly.

23 **C. MOSLEY CANNOT OBTAIN THE PERMANENT INJUNCTIVE RELIEF THAT HE**  
 24 **SEEKS**

25 Mosley’s request for an expedited trial is premised on the erroneous interpretation of the  
 26 California Supreme Court’s decision in Balboa Island Village Inn v. Lemen, 40 Cal. 4th 1141,  
 27 1156 (2007). Based on Lemen, Mosley incorrectly believes that if he prevails on the merits of  
 28

1 his defamation claim, he will be entitled to a permanent injunction preventing Conte's book from  
2 being published. Mosley is not entitled to the unconstitutional prior restraint he is seeking.

3 As a threshold matter, the Lemen court's First Amendment analysis is not binding on this  
4 Court. Indeed, U.S. Supreme Court precedent forbids restraints on future speech, even if past  
5 oral statements have been found to be unprotected speech. See e.g. Vance v. Universal  
6 Amusement Co. Inc., 445 U.S. 308, 311 (1980). Mosley makes no effort to explain why an  
7 injunction would be proper under federal law or Federal Rule of Civil Procedure 65. Fed. R.  
8 Civ. Proc. 65. In any event, Lemen is readily distinguishable. Unlike the situation in Lemen,  
9 Mosley is a public figure and the statements here are a matter of public concern. Public figure  
10 defamation plaintiffs such as Mosley must surmount vastly greater hurdles than private figures,  
11 most notably a showing of actual malice. New York Times v. Sullivan, 376 U.S. 254, 279-80  
12 (1964). Unlike the plaintiff in Lemen, Mosley seeks more than pure injunctive relief. Mosley  
13 also seeks sizeable compensatory and punitive damages. Also, Lemen court found that, due to  
14 First Amendment concerns, any injunction prohibiting speech would have to be limited to the  
15 defendant in the action. Lemen, 40 Cal. 4th 1160. Accordingly, here, even if an injunction was  
16 issued against Conte, it would not forbid third parties, such as book publishers or journalists,  
17 from repeating the same statements regarding Mosley's drug use. There could never be an  
18 injunction against those parties without the constitutional requirement of a finding of actual  
19 malice against each party sought to be enjoined. Sullivan, 376 U.S. at 279-80. That is not  
20 possible here. Mosley's drug use is already public knowledge and will be repeated *ad nauseum*  
21 regardless of any injunction against Conte. Mosley's argument that a quick trial is necessary to  
22 avoid "irreversible damage" to his reputation is a canard.

#### 23 **IV. CONCLUSION**

24 Plaintiff seeks extraordinary relief in an ordinary situation. For the reasons explained  
25 above, Plaintiff's motion should be denied.

1 DATED: May 2, 2008

2 **KERR & WAGSTAFFE LLP**

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4 By s/  
IVO LABAR

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6 Attorneys for Defendant  
VICTOR CONTE